83-705

Office-Supreme Court, U.S.
FILED
OCT 27 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

WERNER DIRON,

PETITIONER

V

CITY OF EASTLAKE,

AND

MORRIS BECKER, INDIVIDUALLY AND

AS MAYOR OF THE CITY OF EASTLAKE,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION OF WERNER DIRON FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under what circumstances, if any, is the equitable doctorine of laches the determinant of the time limits within which an action for wrongful discharge under 42 USC 1983 may be brought, as opposed to the state statute of limitations, when the action was commenced in Federal District Court less than two years after the termination and within the applicable state (Ohio) statutes of limitations (of at least four years, R.C. 2305.09, and more probably, ten years, R.C. 2305.14)? What constitutes timely filing, and when is it jurisdictional in such a situation?

2. Does a 64-year-old city worker employed in the sanitation department for the prior 12 years, in which he has risen to working foreman on a garbage truck, have an expectation of continued employment, so as to afford him a right to a jury trial for bad-faith firing, when he is coerced to resign by the mayor in deprivation of the employee's property interest in his job, and when the

mayor has not followed the procedures mandated by the city's charter and state (Ohio) law for termination?

Is the condoning by summary judgment of such termination a deprivation of his property interest in his job so that he is thereby prevented from having a fair adversary proceeding under Amendment XIV of the U.S. Constitution?

3. Where a question of fact is raised in preliminary court filings whether a terminated city worker was in the classified or in the unclassified service, is it error prejudicial to the Constitutional rights of the claimant to grant a defense motion for summary judgment?

4. Is a city employee not quite 65 years old, with over 12 years of service driving a garbage truck and collecting garbage and rubbish, who is classified as a foreman, who alleges that he was coerced by the mayor into signing a document prepared by the mayor stating that the employee wishes to voluntarily resign because his job as Superintendent of

Sanitation has been abolished, when in fact that employee was neither a Superintendent, nor had the job of Superintendent been abolished, entitled to have a jury trial on the merits to determine whether there has been a bad-faith discharge and a deprivation of any of that employee's rights under 42 USC 1983?

ALL PARTIES ARE LISTED IN THE CAPTION OF THE CASE

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GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the order of the Sixth Circuit Court of Appeals which is sought to be reviewed is August 1, 1983.

The statutory provision believed to confer jurisdiction on this Court is 42 USC 1983, along with Amendment XIV, Section 1 of the U.S. Constitution.

U.S. Constitution, Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC Section 1983: Every person who,

under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ohio Revised Code Section 2305.09 Four years; certain torts. (Appendix p. 43)

Ohio Revised Code Section 2305.14 For other relief. (Appendix p. 43)

Ohio Revised Code Section 124.11 Unclassified and classified service. (Appendix p. 44)

Ohio Revised Code Section 124.34 Tenure of office; reduction, suspension, removal and demotion. (Appendix p. 53)

Charter of the City of Eastlake, Ohio, Article VII, Civil Service, Section 1. General Provisions.

City of Eastlake Ordinance Number 1978-243.

STATEMENT OF THE CASE

Werner Diron worked as a garbage collector and truck driver in the Sanitation Department of the City of Eastlake from 1966 until his 65th birthday, September 22, 1978. Shortly after he returned from his scheduled vacation, he was told by Mayor Becker that he should either retire or that he would be laid off. No warning had been given to him, nor was any reason given.

Diron was faced with having to make an immediate decision about his whole future at the age of 64; he believed under these circumstances that his chances for future income were greater if he were laid off, so shortly after this first meeting with Becker, Diron signed a memo to his superior, the Director of Public Service, Gary Meinke, which stated:

"INTER OFFICE MEMO City of Eastlake

Gary Meinke from Werner Diron

Date August 1, 1978

I have made my decision on it, and

I prefer to be laid off.

/s/ Werner Diron"

The following day, Diron was called by David Miller, Eastlake Finance Director, and told that he could come back to work on condition that he give Mayor Becker assurance that he would retire on his 65th birthday, on September 22, 1978.

Diron reported for work the next day, but before being permitted to start, he was required to see Becker. At a very short meeting, Diron was told by Becker, "You quit or be fired!" Immediately thereafter, Becker handed Diron a pen and ordered him to sign a document which stated:

" August 3, 1978

To: City of Eastlake

The position that I have held as

Superintendent of Sanitation has been

abolished, therefore, I, Werner Diron, wish to voluntarily resign from the City of Eastlake on September 22, 1978, which will be my sixty-fifth (65th) birthday.

/s/ Werner Diron "

Under those circumstances, Diron signed. As a result, he was permitted to gain an additional seven weeks of pay.

Diron was not Superintendent of Sanitation. The position of Superintendent of Sanitation had not been abolished as of either August 1, 1978, August 3, 1978, or September 22, 1978. In fact, it was still in existance on December 13, 1978, according to Eastlake Ordinance No. 1978-243. Neither had Diron's position as foreman been abolished at the time Becker presented the document to Diron to sign. After Diron was terminated, he received a letter of commendation from the Director of Public Service, which stated:

" City of Eastlake, Ohio

October 6, 1978

To Whom It May Concern:

Werner Diron has been employed by the City of Eastlake since January 3, 1966. During that time he rose from a laborer to working foreman of the Sanitation Department, supervising a crew of 10-12 men.

Werner's working habits, attendance and punctuality are above average. He requires little supervision in doing his assigned job and the amount of work accomplished by him in a work day is of good quality and quantity.

I am certain that you will find him a capable and energetic employee. If I can give you any further information, please let me hear from you.

Yours very truly,

/s/ Gary Meinke

Gary Meinke

Director of Public Services "

Diron was led to understand that if he

were laid off as opposed to resigning, he would receive none of his accumulated sick leave. He did not want to leave the employ of Eastlake. No complaints, accusations or charges were made against Diron as a reason for requiring him to leave his employment, either written or oral. Respondents did not hold any hearing at which Diron was allowed to defend himself. He was given no choice by Becker except to quit or be fired. Diron believed that no one else would hire him at his age and with his job background, and felt he had to make some decisions quickly in order to provide the most income he could for himself and his wife. He did not want to retire and would have continued working for Eastlake beyond his 65th birthday if he had not been forced to retire. He did apply for and received Public Employees Retirement System Funds.

Diron did not make policy decisions. Becker never consulted with him in policy matters. Diron was in the classified service

according to Ohio Revised Code Sections 124.11 and 124.34. These state code sections define who falls within the "unclassified," and who falls within the "classified" civil service of cities, the tenure of office, and procedures for reduction, suspension, removal and demotion. These provisions are embodied in Article VII, Section 1 of the Corporate Charter of the City of Eastlake, Ohio, which provides:

> "On and after the effective date of this Charter, the Civil Service of the City shall be divided into the unclassified and classified service as defined by the laws of Ohio and appointments to and promotions in the Civil Service of the City of Eastlake, Ohio, shall be made only according to merit and fitness to be ascertained as far as practical by competitive examinations; and thereafter no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employee in the

Civil Service of the City except as provided by the general laws of the State of Ohio."

Diron's complaint for wrongful firing and deprivation of his Fourteenth Amendment rights in violation of 42 USC 1983 was filed on July 31, 1980, against the City of Eastlake and Morris Becker individually and as Mayor of the City of Eastlake, in U.S. District Court for the Northern District of Ohio, Eastern Division, being Case No. C80 1353. It alleged that the wrongful acts committed were performed under color of law, in the exercise of the power and authority granted to Eastlake and Becker and pursuant to the policies and customs implemented by the City of Eastlake. Defendants in the lower court were given leave to file Amended Answers claiming the statute of limitations had expired, and invoking the equitable doctrine of laches; mitigation of damages was also requested. On February 18, 1982, the proposed Pre-Trial order of the parties was received by the District Court. The Joint Motion of

Defendants for Summary Judgment was filed on February 19, 1982. On July 28, 1982, the Memorandum and Order granting Defendants' Motion for Summary Judgment was filed. The Order that Plaintiff's Complaint be dismissed with prejudice at Plaintiff's costs was filed July 29, 1982.

Plaintiff appealed to the Sixth Circuit, and on August 1, 1983, that Court affirmed the District Court's decision.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Diron had a property interest in his job and an expectation of continued employment, yet he was coerced into signing a document prepared by the Mayor, which document stated that Diron was resigning from a job he never held. The document further stated that the resignation was because that job had been abolished when it hadn't.

42 USC 1983 provided in effect that anyone who, under color of any statute, ordinance,

custom or usage who is deprived of any right, privilege or immunity secured by the Constitution and laws, may bring an action at law or in equity against the one who has so deprived him.

The 14th Amendment to the Constitution provides in part that no state shall deprive any person of property without due process of law. In Diron's case, two false reasons were given for his termination.

He was coerced into signing the document bearing these false statements because of his fear that, since he was almost 65 years old and had no job, he must do what he thought would result in the most dollars for himself and his wife. No charges were brought against him. Nor was he given an opportunity to be heard as required by Ohio law and embodied in the charter of the City of Eastlake.

ARGUMENT

Whether Diron's complaint under 42 USC 1983 was timely filed was a key point upon which his right to a trial on the merits was

denied. In granting Summary Judgment, the District Court departed from the interpretation of the law, and the Circuit Court sanctioned that departure. To fail to correct these errors will deny many little people of their right to a jury trial. Denial of that right will negate the purpose of 42 USC 1983 and Amendment XIV of the Constitution. Such denial will serve as a license to permit those in present political authority to continue, with impunity, to subject civil service employees to their own whims. It will open the door to more wrongful firings by those currently in political power, once they realize that, even should the civil servant pursue his federally protected rights, his resources and will can be ground down in the courts, without ever reaching the merits, by technical interpretations of whether (a) a state statute of limitations applies, and, (b) regardless of whether it does, whether too many months, weeks, or days have passed before redress was sought in the federal courts.

But let us look at the reasoning of the lower courts. Denial of Diron's right to a trial on the merits is grounded in the following findings:

1. Diron agreed to Mayor Becker's demand for retirement by
   a. failure to pursue his state remedies, and
   b. receiving Public Employees Retirement System funds;
2. Laches;
3. Ohio does not view public employment as a property right;
4. Diron has not alleged facts to support a wrongful discharge for interference with a Constitutional right.

As to the first point, this Court has held that exhaustion of state administrative remedies is not a prerequisite to a civil rights action under 42 USC 1983. Patsy v Florida Board of Regents, 457 U.S. 496 (1982). The Ohio Supreme Court determined that an

employee is not prevented from enforcing his common law remedies against his employer for an intentional tort and is entitled to have his case tried on the merits, even though that employee had available to him an administrative remedy. Blankenship v Cincinnati Milacron Chemicals, 69 Oh St 2d 608 (1982). Although that remedy was under the Workers' Compensation Act, the same principle is applicable here.

As to receiving PERS, what was this 65-year-old man with a job history of being a garbage man supposed to do! Starve? He wanted to work! But who would hire him?

He waited too long--"Laches," cried the Defendants. Equity demands he be denied a right to a trial on the merits, they said. Don't even give him a hearing--throw him out of court summarily! And it worked.

Yet, the memoranda of August 1 and of August 3, 1978, strongly indicate that Werner did not "resign" voluntarily. They at least raise a jury question of coercion, so as to

substantiate his claim of a bad faith discharge.

Particularly is the truthfulness of the August 3, 1978, memo the Mayor coerced him to sign called into question by:

1. The fact that Werner was a garbage collector and truck driver, not a Superintendent;
2. The fact that the Superintendent's job was still in existence on August 3, 1978, contrary to what was stated in the memo Becker had Werner sign;
3. Eastlake's Ordinance No. 1978-243, which states that the job of Superintendent in the Sanitation Department was still in existence on December 13, 1978, months after Diron was terminated;
4. The letter of commendation from Diron's boss, the Director of Public Safety, dated October 6, 1978, after Werner had been

terminated calling him a "working foreman of the Sanitation Department, supervising a crew of 10-12 men."

He was forced out of his job in an outrageous manner. All he's asking is a chance to prove it in front of a jury.

Can these Defendants who did not do equity ask this Court to condone their equitable defense of laches? How should this time bar be balanced against Ohio's ten year statute of limitations (R.C. 2305.14)? Is it right that laches should be substituted for a state statute of limitations in this case? How about all the other city employees in the country who may incur the displeasure of elected politicians?

The highest court in Ohio to rule on the question of public employment being a property right has stated that it is. In Jackson v Kurtz, 69 Oh Ap 2d 152 (1979) the Hamilton County Court of Appeals held that a permanent employee in the classified service may bring an action in the Common Pleas Court against

her supervisors for damages pursuant to 42 USC 1983, citing Board of Regents v Roth, 408 US 564 (1972). In Jackson no specific charges were ever made, plaintiff was given no opportunity to present evidence, and the authorities who investigated and brought the charges also sat in judgment of them. The Jackson court further stated, "We hold that R.C. 124.34 gives employees in the classified service a right to tenure during good behavior and efficient service (claim of entitlement) that cannot be reduced, suspended or removed except for certain specific causes therein listed...Plaintiff had two rights: a property right in unabused employment and a liberty right to be free from defamation directly affecting such employment. Goss v Lopez, 419 US 565 (1975)." A motion to certify the record in the Ohio Supreme Court was overruled April 3, 1980.

Diron was a classified employee--he made no policy decisions. He wasn't consulted by the Mayor about anything. He wasn't

authorized to act in place of his superior, nor did he hold a fiduciary relationship with him. Ohio Revised Code Section 124.11 (A) (9). He did not hire any people. He was merely a foreman, not a Superintendent. As a classified employee he was entitled to certain procedural rights:

Written charges;

Reasons;

The filing of an order;

An opportunity to be heard (Ohio Revised Code Section 124.34).

None of this has even been pleaded. Why? Because the Mayor and Eastlake never did any of what their own charter and Ohio law require. Yet they come into court asking for equitable relief.

This Court has held that filing a timely charge of discrimination is not jurisdictional. Zipes v Trans World Airlines, Inc., 102 S Ct 1127 (1982). Although Zipes was a Title VII suit, this Court reasoned that compliance with the filing period was a requirement

subject to waiver as well as tolling when equity so required, and recognized the remedial purpose of the legislation as a whole. No where has it been shown that the only remedy Diron had was to follow Ohio's civil service procedures to the exclusion of all other alternative possibilities.

What was the point of going through state civil service administrative procedure, when to do so would merely give reinstatement to his job. That would merely put Diron, if successful, back at the mercy of the man who had just gotten rid of him.

CONCLUSION

By summarily ruling that the equitable doctrine of laches takes precedence over the tortious termination brought well within the applicable state statute of limitations, the District Court has departed from the accepted and usual course of judicial proceeding of letting a jury of his peers decide whether this city employee was wrongfully discharged. The action of the Circuit Court in sanctioning such a departure by the lower court calls for an exercise of this Court's power of supervision. The question of timeliness should be settled by this Court.

Granting Diron his right to a trial on the merits will serve as a deterrent to politicians in power from unlawfully discharging city employees who are otherwise vulnerable to the whims of those currently in power.

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APPENDIX

No. 82-3539

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

AUG 1, 1983

JOHN P. HEHMAN, Clerk

WERNER DIRON,

Plaintiff-Appellant, ORDER

v.

CITY OF EASTLAKE: MORRIS BECKER, Individually and as Mayor of the City of Eastlake c/o Eastlake Municipal Offices,

Defendants-Appellees.

Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge; and REED, District Judge*

Werner Diron appeals from a summary judgment in favor of defendants the City of Eastlake, Ohio ("Eastlake") and Morris Becker, sued individually and as Mayor of Eastlake, in a suit alleging wrongful termination pursuant

to 42 U.S.C. § 1983.

Diron filed his complaint on July 31, 1980. He alleged below that he was coerced into signing a document on August 3, 1978, which stated he planned to retire because his position as Superintendent of Sanitation with Eastlake had been abolished. He asserted that he worked as a classified employee rather than as a Superintendent and thereby had a property right under Ohio law which could not be terminated absent a hearing. The district judge rejected Diron's claim, stating that Diron acquiesced in his retirement by accepting a pension rather than suing for restoration of his job. He held further that Diron was guilty of laches because he failed to file suit and he collected funds for two years, noting that if Diron were a classified employee he could have sought redress under state law. The district judge noted that if Diron were the Superintendent and therefore an unclassified employee, he had no property interest in his position under Ohio law. Finally, the district judge

held that Diron presented no evidence supporting wrongful interference with any other constitutional right. This appeal followed.

For the reasons set forth in the Memorandum and Order of United States District Judge George W. White, see Diron v. City of Eastlake, C80-1353, (N.C. Ohio, July 30, 1982),

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

*The Honorable Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

FILED

1982 JUL 28 PM 1:28

CLERK U.S. DISTRICT COURT

NORTHERN DISTRICT OF OHIO

CLEVELAND

WERNER DIRON	)	
Plaintiff	)	C80-1353
vs.	)	
CITY OF EASTLAKE, et al.	)	MEMORANDUM AND
Defendants	)	ORDER

The plaintiff was employed as a foreman in the City of Eastlake Service Department for 12 years until September 22, 1978. His duties included the collection of rubbish. On or about August 1, 1978 the plaintiff was told by the Defendant Morris Becker, Mayor of the City of Eastlake, that he should retire or he would be terminated from his employment. The plaintiff alleges that he was coerced into signing a document stating that he wished to

voluntarily resign because his position of Superintendent of Sanitation had been abolished. He was led to understand that if he were laid off he would receive none of his sick leave. Since plaintiff was physically able to perform his duties he did not wish to resign. At no time were specific charges made against him. No hearing was held wherein plaintiff could defend himself. As a result plaintiff alleges he was denied fundamental guarantees of due process, equal protection of the laws, and privileges and immunities protected by the laws. The plaintiff claims that the defendants took such action against him in retaliation for his associations and for duties performed contrary to the wishes of Defendant Becker. The plaintiff alleges that his termination was in violation of the Civil Rights Act of 1871, 42 U.S.C. §1983 and the Fourteenth Amendment and constituted a denial of his property interest in his job and breach of plaintiff's continuing employment contract with the City of Eastlake.

The defendants have filed a joint motion for summary judgment. They assert that the plaintiff's employment was in the unclassified service. He had no property interest in his employment and therefore had no right to a hearing regarding the discharge. They also contend that even if plaintiff can be considered in the classified service plaintiff acquiesced in his retirement and applied for and accepted Public Employees Retirement System Benefits, barring him from maintaining this action.

Although plaintiff's job title was Superintendent of the Santitation Department, he claims that his duties were those of the ordinary employee of that department precluding him from being in the unclassified service of the Civil Service System. This would be important for determining whether he was entitled to the protections granted by the Civil Service System. However assuming that he was a part of the classified service acquiescence in his retirement and receipt of

PERS funds would bar this action for the following reasons.

It is uncontroverted that plaintiff resigned and has been receiving PERS funds since 1978. In State ex rel Sheets v City of Portsmouth, 143 Ohio St 302 (1942), the City Council inacted an ordinance providing that all members of the police and fire departments be retired at age 65. Sheets having reached 65 on the day the ordinance became effective asked to be placed on the pension roles and he received pension checks for over two years. At that time he believed the City had the right to retire him. Subsequently the Ohio Supreme Court held this retirement law invalid. Sheets then filed a mandamus action to be restored to his original position. The Ohio Supreme Court held that Sheets voluntarily waived his rights under Ohio Revised Code §124.34. The Court stated:

> "Where a city chief of police, under an ordinance, voluntarily assented to his retirement and applied for and

received a police pension for more than two years, he was not entitled to mandamus to restore him to his position on ground that he had been misled as to the validity of the ordinance, by advice of counsel, a court decision, and statements of the city manager who notified him of his retirement."

The Court found that he could have refrained from acquiescing withheld his consent, not applied for a pension, and immediately bring suit for restoration.

In State ex rel Bauer v Director of Agricultural, 12 OLA 481, (1932), an action by plaintiff who voluntarily resigned but claimed he did so under duress was dismissed because of delay in making the claim of duress and in filing the complaint.

The plaintiff contends that the cases cited by defendants are mandamus actions. The Ohio Statute of Limitations applicable to the instant action is ten (10) years. (ORC 2305.14)

Therefore there was plenty of time to file this action. However the defendants have included the affirmative defense of laches in their answers.

Laches operates when the Statute of Limitations has not run; when a litigant fails to act properly, so that the delay results in prejudice and an injustice to the defendant. Cason v United States, 461 F.2d 784 (U.S. Court of Claims 1972).

Several cases involving the discharge of federal employees have upheld a defendant's defense of laches. In Arent v. Lane, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650 (1919), the Supreme Court held that a supervisor of a national park who waited twenty (20) months after being discharged by the Secretary of Interior before filing an action was barred by laches. The Court said:

> "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake

as to the facts of his case, obvious considerations of public policy make it of first importance that he should properly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service."

Assertion of ignorance of a legal right to maintain an action for reinstatement was held to be an insufficient defense to a charge of laches. Baskin v. TVA, 382 F. Supp 641 (M.D Tenn. 1974). The Court in Baskin found that plaintiffs did not contend that they were unaware of facts, but merely that they did not know they had an action. A motion to dismiss for summary judgment was determined to be the proper procedure for challenging plaintiff's right to proceed when the defense of laches was raised. In that case there was a delay in filing of twenty seven (27) months. See

Nicholas v. United States, 257 U.S. 71 42 S.Ct. 7 66 L.Ed. 133 (1921) (three (3) years delay), Norris v. United States, 257 U.S. 77, 42 S.Ct. 9, 66 L.Ed. 136 (1921) (eleven (11) months delay).

The plaintiff in the instant case was aware of the fact that he was required to retire under circumstances unacceptable to him. The laws of Ohio provide adequate redress to a civil service employee who has been discharged in controvention of state law. The plaintiff could have taken advantage of the procedures for challenging his allegedly wrongful termination. Yet he chose to resign and accept PERS funds for two (2) years. Acquiescence in retirement along with laches bars plaintiff from maintaining this action.

Assuming plaintiff was an unclassified employee of the City of Eastlake; that is, not protected by the Civil Service System as set forth by the laws of Ohio, his action for wrongful discharge still lacks merit.

The plaintiff argues that he has a

property interest in his position protected by the Fourteenth Amendment. The United States Supreme Court has decided that protected interests in employment within the Fourteenth Amendment are not normally created by the Constitution but rather they are created by an independent source such as state statutes or rules entitling citizens to benefits. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 42 L.Ed. 725 (1975), Skrocki v. Caltabiano, 505 F.Supp 916 (E.D. Pa. 1981) Continuous Employment over a long period of time can amount to the equivalent of tenure, a property right protected by due process of law. Whether the claimant has a sufficient expectation of continued employment must be decided by reference to state law. Kohler v. Hirst, 460 F. Supp 412 (E.D. Va. 1978).

The right of appointment to a position in the public service is not a property right in the State of Ohio. State ex rel King v Emmons, 47 O. App. 348 (1933). Persons in the unclassified service may be removed or

suspended at the pleasure of their superiors. State ex rel Schneller, 15 ONP NS 438, 26 O Dec 171 (1914).

The plaintiff has submitted an affidavit along with his brief in opposition to defendants' motion for summary judgment. Although he states in his complaint he has a continuing contract with the defendants he has not supported this allegation in his affidavit nor has he attached a copy of the contract to the complaint. In the absence of an allegation or some showing that by reason of rules and understandings promulgated and fostered by the City officials that there existed a de facto tenure system this allegation must fail in considering this motion for summary judgment. Perry v. Sinderman, 408 U.S. 593 92 S.Ct. 2694 33 L.Ed. 2d 570.

Even though a public employee serving at will may be discharged without cause, the discharge must not be for retribution for exercise of some constitutionally protected right. 537 F. 2d 1269 (4th Cir. 1976).

Plaintiff's complaint contains the allegation that he was discharged in retaliation for his associations. However naked allegations that defendants have interfered with a constitutionally protected right are insufficient to state a cause of action. Conclusions must have supporting facts. Kobler v. Hirst, supra.

In summary, the Court finds that plaintiff's first cause of action is not maintainable because the plaintiff has acquiesced in defendants' demand for his retirement as evidenced by his failure to pursue his state remedies and by receiving PERS funds. The Court also rules for defendants on their defense of laches for plaintiff's failure to file this action for two (2) years after accrual. His second claim fails because the State of Ohio does not view public employment as a property right nor has plaintiff alleged facts to support a wrongful discharge for interference of a constitutional right.

Accordingly, defendants' motion for summary judgment is granted. Case dismissed at plaintiff's costs.

IT IS SO ORDERED.

/s/ George W. White

George W. White

U.S. DISTRICT JUDGE

WHITE J.

FILED

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CLERK U.S. DISTRICT COURT

NORTHERN DISTRICT OF OHIO

CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

WERNER DIRON,	)	
Plaintiff	)	ORDER
v.	)	C80-1353
CITY OF EASTLAKE, et al.,	)	
Defendant	)	

Upon the Court's Memorandum and Order filed July 28, 1982,

IT IS ORDERED that plaintiff's complaint is hereby dismissed, with prejudice, at plaintiff's costs.

/s/ George W. White

George W. White

United States District Judge

Ohio Revised Code Section 2305.09

Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Ohio Revised Code Section 2305.14

For other relief.

An action for relief not provided for in sections 2305.04 to 2305.131 (2305.13.1),

inclusive, and section 1304.29 of the Revised Code, shall be brought within ten years after the cause thereof accrued. This section does not apply to an action on a judgment rendered in another state or territory.

Ohio Revised Code Section 124.11

Unclassified and classified service.

The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(1) All officers elected by popular vote or persons appointed to fill vacancies in such offices;

(2) All election officers and the employees and clerks of persons appointed by

boards of elections;

(3) The members of all boards and commissions, and heads of principal departments, boards, and commissions appointed by the governor or by and with his consent; and the members of all boards and commissions and all heads of departments appointed by the mayor, or, if there is no mayor such other similar chief appointing authority of any city or city school district; except as otherwise provided in division (A)(17) or (C) of this section, this chapter does not exempt the chiefs of police departments and chiefs of fire departments of cities or civil service townships from the competitive classified service;

(4) The members of county or district licensing boards or commissions and boards of revision, and deputy county auditors;

(5) All officers and employees elected or appointed by either or both branches of the general assembly, and such employees of the city legislative authority as are engaged in legislative duties;

(6) All commissioned and noncommissioned officers and enlisted men in the military service of the state including military appointees in the office of the adjutant general;

(7) All presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of said public school system, colleges, and universities; and the library staff of any library in the state supported wholly or in part at public expense;

(8) Three secretaries, assistants, or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants, or clerks and one personal stenographer for other elective officers and each of the principal appointive

executive officers, boards, or commissions, except civil service commissions, authorized to appoint such secretary, assistant, or clerk and stenographer;

(9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principals and those persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination, provided, that this subdivision shall not affect those persons in county employment in the classified service as of September 19, 1961. Nothing in this subdivision applies to any position in a county department of welfare created pursuant to sections 329.01 to 329.10 of the Revised Code.

(10) Bailiffs, constables, official stenographers, and commissioners of courts of record, and such officers and employees of courts of record as the commission finds it impracticable to determine their fitness by competitive examination;

(11) Assistants to the attorney general, special counsel appointed or employed by the attorney general, assistants to county prosecuting attorneys, and assistants to city directors of law;

(12) Such teachers and employees in the agricultural experiment stations; such student employees in normal schools, colleges, and universities of the state; and such unskilled labor positions as the director of administrative services or any municipal civil service commission may find it impracticable to include in the competitive classified service; provided such exemptions shall be by order of the commission or the director, duly entered on the record of the commission or the director with the reasons for each such exemption;

(13) Any physician or dentist who is a full-time employee of the department of mental health and mental retardation or of an institution under its jurisdiction; and physicians who are in residency programs at the institutions;

(14) Up to twenty positions at each institution under the jurisdiction of the department of mental health and mental retardation that the department director determines to be primarily administrative or managerial; and up to fifteen positions in any division of the department, excluding administrative assistants to the director, division chiefs, or commissioners, which are within the immediate staff of a division chief or commissioner and which the director determines to be primarily and distinctively administrative and managerial;

(15) Noncitizens of the United States employed by the state, its counties or cities, as physicians or nurses who are duly licensed to practice their respective professions under

the laws of Ohio, or medical assistants, in mental, tuberculosis, or chronic disease hospitals, or institutions;

(16) Employees of the governor's office;

(17) Fire chiefs and chiefs of police in civil service townships appointed by boards of township trustees under section 505.38 or 505.49 of the Revised Code;

(18) Employees of the Ohio rail transportation authority, except as otherwise provided in division (A) of section 4981.04 of the Revised Code.

(B) The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof, not specifically included in the unclassified service. Upon the creation by the board of trustees of a civil service township civil service commission, the classified service shall also comprise, except as otherwise provided in division (A) (17) or (C) of this section, all persons in the

employ of civil service township police or fire departments having ten or more full-time paid employees to be designated as the competitive class and the unskilled labor class.

(1) The competitive class shall include all positions and employments in the state and the counties, cities, city health districts, general health districts, and city school districts thereof, and upon the creation by the board of trustees of a civil service township of a township civil service commission all positions in civil service township police or fire departments having ten or more full-time paid employees, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by the promotion, reinstatement, transfer, or reduction, as provided in this chapter, and the rules of the director of administrative services, by appointment from

those certified to the appointing officer in accordance with this chapter.

(2) The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the director. The director or the commission shall in his rules require an applicant for registration in the labor class to furnish such evidence or take such tests as the director deems proper with respect to age, residence, physical condition, ability to labor, honesty, sobriety, industry, capacity, and experience in the work or employment for which he applies. Laborers who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought, and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. Upon the request of an appointing officer, stating the kind of labor needed, the pay and probable length of employment, and the number

to be employed, the director shall certify from the highest on the list, double the number to be employed, from which the appointing officer shall appoint the number actually needed for the particular work. In the event of more than one applicant receiving the same rating, priority in time of application shall determine the order in which their names shall be certified for appointment.

(C) A municipal or civil service township civil service commission may place volunteer firemen who are paid on a fee-for-service basis in either the classified or the unclassified civil service.

Ohio Revised Code Section 124.34

Tenure of office; reduction, suspension, removal and demotion.

The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised

Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order or reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officers or employee may

appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire department of a city or civil service township, the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which order shall state the reasons therefor. Such order shall be filed with the municipal or civil service township civil service commission. Within ten days following the filing of such order such chief or member of a department may file an appeal, in writing, with the municipal or civil service township civil service commission. In the event such an appeal is filed, the commission shall forthwith notify the

appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the municipal or civil service township civil service commission to the court of common pleas in the county in which such city or civil service township is situated. Such appeal shall be taken within thirty days from the finding of the commission.

EASTLAKE

ORDINANCE NO. 1978-243

An Ordinance amending subsection (F) of Section 155.09, Employee Classification and Pay Steps by Grade Number, of the Eastlake Codified Ordinances, and declaring an emergency.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF EASTLAKE, LAKE COUNTY, OHIO:

SECTION 1. That subsection (F) of

Section 155.09, Employee Classification and Pay Steps by Grade Number, of the Eastlake Codified Ordinances be amended to read in its entirety as follows:

SECTION 155.09 EMPLOYEE CLASSIFICATION AND PAY STEPS BY GRADE NUMBER

F. Sanitation Department

Superintendent	35 - 53
Crew Foreman	23 - 47
Laborer I	19 - 39
Laborer II	27 - (90 day probationary)

SECTION 2. That it is found and determined that all action of Council concerning and relating to the adoption of this Ordinance were so adopted in meetings open to the public, and Council and its committees acted in full compliance with Chapter 112 of the Codified Ordinances of the City of Eastlake.

SECTION 3. That the within Ordinance is presented as an emergency measure necessary for the immediate preservation and protection of the public peace, health, safety and

general welfare of the inhabitants of the City, and for the further reason that the within action constitutes a part of the usual daily operation of a department of the City; and, therefore, this Ordinance shall become effective immediately upon its passage by the Council and approval of the Mayor.

/s/ James A. Krainz
PRESIDENT OF COUNCIL

PRESENTED TO THE MAYOR: 12/12/78

APPROVED: 12/13/78

/s/ Morris Becker
MAYOR

ADOPTED: 12/12/78

ATTEST: /s/ Marjorie Hlebak
CLERK OF COUNCIL

CERTIFICATE OF SERVICE

Three copies each of the foregoing Petition were sent to Theodore R. Klammer, Attorney for City of Eastlake, Respondent, c/o Mastrangelo, Freda & Klammer, Parkhill Professional Building, 35100 Euclid Avenue, Willoughby, Ohio 44094 and to C. Reynolds Keller, Jr., Attorney for Morris Becker, Respondent, c/o Weston, Hurd, Fallon, Paisley & Howley, 2500 Terminal Tower, Cleveland, Ohio 44113 by regular U.S. mail, postage prepaid, this 27 day of October, 1983.

Albert B Polen

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 83-705

Supreme Court of the United States

October Term, 1983

WERNER DIRON,
Petitioner,

vs.

CITY OF EASTLAKE,

and

MORRIS BECKER, Individually and as Mayor of the City of Eastlake,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does Petitioner's Failure To Make A Claim For Reinstatement And Back Pay For A Period Of Two (2) Years, Coupled With His Application For And Receipt Of Retirement Benefits From October 1, 1978, To The Present Time Bar This Action As A Matter Of Law?

II. Does Petitioner's Admitted Position As Head Of The Department Of Sanitation For The City Of Eastlake Preclude Any Contention That He Had A Legitimate Claim Of Entitlement To Continued Employment Under Ohio Law?

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No. 83-705

Supreme Court of the United States

October Term, 1983

WERNER DIRON,
Petitioner,

vs.

CITY OF EASTLAKE,

and

MORRIS BECKER, Individually and as Mayor of the City of Eastlake,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On July 31, 1980, Petitioner commenced this action in the United States District Court for the Northern District of Ohio, Eastern Division. On July 29, 1983, the District Court granted Respondents' Motion for Summary Judgment (See Petition, p. 30).

On August 1, 1983, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court (See Petition, p. 27).

JURISDICTIONAL STATEMENT

Petition filed a Petition for a Writ of Certiorari on October 27, 1983, pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner maintains that Fourteenth Amendment rights were infringed. In addition, Petitioner claims the applicability of 42 U.S.C. 1983, Ohio Revised Code §§2305.09, 2305.14, 124.11, 124.34, Charter of Eastlake Article VII, Civil Service, Section 1, General Provisions, and Eastlake Ordinance No. 1978-243.

STATEMENT OF THE CASE

In August, 1978, Petitioner held the position of and was paid as a Superintendent of the Eastlake, Ohio Sanitation Department. He was head of his department. Petitioner admitted that he held the highest position in the department, that everyone in the department reported to him, and that he reported only to the Service Director who had jurisdiction over all of the City's service departments.

On August 7, 1978, Petitioner was informed by Mayor Morris Becker that he should either retire from employment with the City of Eastlake or that he would have to be laid off. Petitioner initially elected to be laid off.

The following day, August 2, 1978, Petitioner received a telephone call at his home from David Miller, the Finance Director for the City of Eastlake. During the course

of that conversation, Petitioner learned that Mr. Miller, on behalf of Mayor Becker, had offered to allow him to return to his position as Superintendent of the Sanitation Department if Petitioner would agree to retire voluntarily from the City's employment effective September 22, 1978.

Petitioner gave the matter some thought and decided to accept the Mayor's offer as related to him by the Finance Director. On August 3, 1978, he returned to his job with the City and at that time executed a writing which stated that he would voluntarily retire from the employment of the City effective September 22, 1978.

On January 10, 1979, as a cost saving measure, the Council of the City of Eastlake formally abolished the position of Superintendent of the Sanitation Department.

Immediately following Petitioner's retirement on September 22, 1978, he applied for benefits from the State of Ohio Public Employees Retirement System. In due course, Petitioner received a certificate from the Public Employees Retirement Board indicating that payment of benefits to the plaintiff commencing October 1, 1978, had been approved. Petitioner received the following amounts in each of the stated years:

1978 — $ 1,291.62
1979 — $ 5,106.09
1980 — $ 5,258.13

Indeed, Petitioner has continued, up to the present time, to receive retirement benefits.

On July 31, 1980, Petitioner commenced this action against the City of Eastlake and Mayor Becker.

ARGUMENT

I. PETITIONER'S LACHES IN FILING THIS ACTION, ACQUIESCENCE IN HIS RETIREMENT, AND APPLICATION FOR AND RECEIPT OF PUBLIC EMPLOYEES RETIREMENT SERVICE BENEFITS FROM OCTOBER 1, 1978, TO THE PRESENT TIME, BAR THIS ACTION AS A MATTER OF LAW.

A. Uncontested Facts.

By August 3, 1978, Petitioner had actual knowledge that he would be required to resign and retire from City employment on September 22, 1978—more than six weeks in the future. Although Petitioner now contends that this course was unacceptable to him, the fact is that instead of pursuing an administrative or judicial remedy, Petitioner chose to apply for retirement benefits from the State of Ohio Public Employees Retirement System. The Public Employees Retirement Board of the State of Ohio commenced paying benefits to Petitioner on October 1, 1978, and Petitioner has continued to receive retirement benefits to the present.

B. The District and Circuit Courts Correctly Applied the Law of Ohio.

In *State, ex rel. Sheets v. Portsmouth,* 143 Ohio St. 302 (1944) city council passed an ordinance providing that all members of the police and fire departments be honorably retired at age sixty-five. Sheets, a classified employee, reached the age of sixty-five on the day the ordinance took effect. On that day, the city manager wrote to Sheets advising him that he was honorably retired subject to his

pension rights. Although Sheets was appointed acting chief of police for a period of time, he voluntarily requested that he be placed on the pension rolls—just as did Petitioner in the case at bar. Sheets was enrolled and received monthly pension checks for over two years. Subsequently, the Ohio Supreme Court held the City's retirement ordinance invalid. Sheets then filed a mandamus action seeking reinstatement. He alleged that the cause of his two year delay in filing the mandamus action seeking reinstatement was that he believed in good faith that the City ordinance was a valid enactment. The Ohio Supreme Court held that Sheets' voluntarily act in assenting to his retirement by application for and receipt of police pension benefits constituted a waiver of his rights under G.C. 486-17(A)—the predecessor to Section 124.34 Ohio Revised Code. In denying Sheets' application for a writ of mandamus restoring him to his former job, the Ohio Supreme Court held:

> ". . . Relator, however, by his conduct, at the time of his retirement, waived a right of action for his restoration; he could have refrained from acquiescing, withheld his consent, and not applied for a pension and then immediately brought his proceeding for restoration. Acting upon the assumption that the ordinance was valid, he took the course he did. His assumption of the validity of the ordinance, though based upon advice of counsel and the court decision referred to, cannot reinvest him with a right of action, which he yielded when he voluntarily retired and accepted the pension. The writ is denied and the petition dismissed." *Sheets* at p. 304.

See: *State, ex rel. Moore v. Sanders,* 65 Ohio St. 2d 72 (1981) (delay of twenty months held fatal to plaintiff's action); *State, ex rel. Stoer v. Raschig,* 141 Ohio St. 477 (1943) (civil servant who waited eleven months after

dismissal barred from reinstatement because of laches—particularly since, as in the case at bar, plaintiff's former position was abolished in the interim. *Stoer* at p. 488); *State, ex rel. Bauer v. Director of Agriculture*, 12 Ohio L. Abs. 481 (1932, Franklin County) (delay of seven months barred plaintiff's action).

Under the controlling law of Ohio Appellant's conduct clearly bars this action.

C. The Decision of the Sixth Circuit Is Clearly Consistent With the Decisions of This Court and Other Circuits.

In *United States, ex rel. Arant v. Lane*, 249 U.S. 367, 63 L. Ed. 650, 39 S. Ct. 293 (1918), Arant, who claimed to be a classified civil service employee of the Federal Government, was first requested to resign and subsequently forcibly ejected from office on July 20, 1913. On April 30, 1915, approximately 21 months later, Arant filed a mandamus action. This Court stated:

> "Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes of the branch of the service to which he was attached, and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy." *Arant* at p. 372.

In holding that Arant's claim was barred by laches, the court fastened upon "considerations of public policy." A public employee:

"Should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified, the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service." *Arant* at p. 372.

In *Baskin v. TVA*, 382 F. Supp. 641 (M.D. Tenn. 1974), the District Court held that a delay of 27 months constituted laches barring the action. The Court referenced *Arant v. Lane, supra*, and listed a number of parallel cases.

"In addition to the *Lane* case, delays by discharged federal employees in bringing suit were held to constitute laches and a bar to the actions in the following cases: *Norris v. United States*, 257 U.S. 77, 42 S. Ct. 9, 66 L. Ed. 136 (1921) (11 months' delay); *Nicholas v. United States*, 257 U.S. 71, 42 S. Ct. 7, 66 L. Ed. 133 (1921) (3 years' delay); *Grasse v. Snyder*, 89 U.S. App. D.C. 352, 192 F.2d 35 (1951) (16 months' delay); *Caswell v. Morgenthau*, 69 App. D.C. 15, 98 F.2d 296, *cert. denied*, 305 U.S. 596, 59 S. Ct. 81, 83 L. Ed. 378 (1938) (18 months' delay); *Haas v. Overholser*, 96 U.S. App. D.C. 22, 223 F.2d 314 (1955) (24 months' delay); *Chiriaco v. United States*, 235 F. Supp. 850 (N.D. Ala. 1963), *aff'd.* 339 F.2d 588 (5th Cir. 1964) (24 months' delay); *Drown v. Higley*, 100 U.S. App. D.C. 326, 244 F.2d 774 (1957) (27 months' delay); *Brown v. United States*, 418 F.2d 442 (5th Cir. 1969) (28 months' delay); *United States ex rel. Cromwell v. Doyle*, 69 App. D.C. 215, 99 F.2d 448 (1938), *cert. denied*, 306 U.S. 640, 59 S. Ct. 488, 83 L. Ed. 1041 (1939) (30 months' delay); *Davis v. Tennessee Valley Authority*, 214 F. Supp. 229 (N.D. Ala. 1962), *aff'd.* 313 F.2d 959 (5th Cir.), *cert. denied*, 375 U.S. 818, 84 S. Ct. 53, 11 L. Ed. 2d 52 (1963) (20

months' delay before filing suit in court of claims, and 11 months' delay before filing suit in district court); *Coughlin v. Ryder*, 260 F. Supp. 256 (E.D. Pa. 1966) (Approximately 2 years' delay)." *Baskin* at p. 646-7.

When it is considered that not only did Petitioner fail to commence any action for a period of 24 months, but that he also applied for and has continued to receive public retirement benefits, the correctness of the District Court's and Sixth Circuit's ruling becomes apparent.

II. AS A MATTER OF LAW, PETITIONER WAS AN UNCLASSIFIED EMPLOYEE OF THE CITY OF EASTLAKE. ACCORDINGLY, PETITIONER HAD NO PROTECTED PROPERTY INTEREST IN CONTINUED EMPLOYMENT AND HE SERVED AT THE WILL OF THE APPOINTING AUTHORITY, THE MAYOR.

A. Under the Law of Ohio Petitioner Had No Protected Property Interest.

It is axiomatic that in order to state a claim under 42 U.S.C. §1983 upon which relief can be granted, it is incumbent upon Petitioner to establish a judicially recognized property interest in continued employment. This Court discussed this requirement in *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> * * * * *

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 33 L. Ed. 2d 548, 561.

Under the controlling law of Ohio, certain *classified* public employees, by statute, have such a "legitimate claim of entitlement" in continued employment. Section 124.34 Ohio Revised Code provides:

> "The tenure of every officer or employee in the *classified* service of . . . cities . . . shall be during good behavior and efficient service." (Emphasis added.)

No such entitlement, however, exists for public employees in the *unclassified* service. By statutory definition, Petitioner held an *unclassified* public service position. Section 124.11(A)(3) states:

> "(A) the unclassified service shall comprise the following positions, *which shall not be included in the classified service,* and which shall be exempt from all examinations required by this chapter:
>
> * * * (3) . . . the members of all boards and commissions and all heads of departments appointed by the mayor . . ." (Italics supplied.)

As a mayoral appointee in the unclassified service and as the admitted head of his department, Petitioner had no claim of entitlement to continued employment. This long standing principle was set forth by the Ohio Supreme Court in *Knoup, Treasurer v. Piqua Branch of State Bank of Ohio,* 1 Ohio St. 603 (January Term, 1853) at 616:

> "The best illustration of this, perhaps, will appear by comparing the nature of an office in England and any office in America. An office like a franchise is a royal gift: it is considered property in England. Some offices are estates in fee simple, or fee tail; some, estates for life, and some only estates at will. There are some offices, also, which are said to be estates for a term of years, or for one year. And ministerial offices may be granted in revision or to commence at a future period. Some offices are even assignable by deed. But, in America, a public officer is only a public agent or trustee, and has no proprietorship or right of property in his office."

In *State, ex rel. Gordon, City Atty. v. Barthalow*, 150 Ohio St. 499 (1948), the Ohio Supreme Court addressed and resolved the issue of whether a public employee had a property right in his employment:

> "1. A public officer or a public general employee holds his position neither by grant nor contract, nor has any such officer or employee a vested interest or private right of property in his office of employment." *Gordon* at p. 499, Syl. 1.

See also: *Fuldauer v. Cleveland*, 32 Ohio St. 2d 114 (1972), Syl. 3, and *State, ex rel. King v. Emmons*, 47 Ohio App. 348 (Hamilton Co. 1933). Indeed, persons in the unclassified service may be removed or suspended at the pleasure of their superiors. *State, ex rel. Jenkins v. Schneller*, 15 Ohio N.P. (n.s.) 438, 26 Ohio Dec. 171 (1914). 15 OHIO JUR. 3d, *Civil Servants*, §125, Page 101.

Under Ohio law, Petitioner had no property or contract right in continued employment. Accordingly, his claim must fail.

B. Under the Law of Ohio, a Party May Not Create a Jury Issue by Developing Contradictions in His Own Testimony.

Petitioner has attempted to create an issue of fact by attaching a self-serving affidavit to his brief in opposition to Respondents' motion for summary judgment. Ohio law, however, clearly establishes that Petitioner is absolutely bound by the judicial admissions he made during the course of his two depositions. Indeed, no party may create a jury question by pointing to his own conflicting testimony.

> "The testimony of a party to an action necessarily subversive of his interest in the particular action is regarded in all courts as conclusive. In short, a party who becomes a witness is bound by his admissions on the witness stand." 21 OHIO JUR. 2d, *Evidence*, §684.

The Ohio Supreme Court in *Winkler v. Columbus*, 149 Ohio St. 39 (1948), upheld the trial court's direction of a verdict for defendants when plaintiff testified one way during the direct examination and to the contrary on cross-examination. The Court stated:

> "The Court of Appeals assumed that because plaintiff testified one way in chief and contrarily on cross-examination, the case should be left to the jury to choose between the conflicting statements. That would be proper in the case of an ordinary witness, but where the testimony involved is that of the plaintiff and the plaintiff's testimony, whether in chief or cross-examination, discloses negligence on the part of plaintiff contributing directly to her injury, the *fact* has been settled and the matter becomes a question of law to be determined by the court." *Winkler* at p. 44.

In the present case, Petitioner's deposition testimony conclusively establishes that Petitioner served by statutory definition as an unclassified employee.

"Q. In 1976, you were the head of the sanitation department; isn't that correct?

A. Yes, sir.

Q. You held the highest position in the sanitation department; isn't that true?

A. Yes, sir.

Q. There was no one over you? Isn't that true in the sanitation department?

A. No, sir.

Q. The only one you had to answer to was the service director; is that correct?

A. Yes, sir." (p. 21.)

It is clear that at all pertinent times, Petitioner held the position of the head of a department—a position expressly exempted by the Ohio statute from the classified civil service. Since Petitioner was by definition an unclassified employee, he enjoyed no legitimate claim of entitlement and was subject to removal at the pleasure of the Mayor.

CONCLUSION

On August 3, 1978, Petitioner knew that he would be required to retire in six weeks from his position as head of the Eastlake Sanitation Department of the City of Eastlake on September 22, 1978. Even though he now claims that this was a completely unacceptable choice, the fact remains that he failed to take any action until July 31, 1980—a prejudicial delay of almost 2 years to the day. Indeed, instead of contesting the decision of the Mayor, Petitioner applied for and has continued to receive retirement benefits—conduct that is totally inconsistent with the position Petitioner advanced in the Courts below and now advances to this Court.

Under the circumstances of this case, the law of Ohio clearly bars Petitioner's claim. Sound dictates of public policy mandate that public employees press their claim for reinstatement and back pay promptly and responsibly. Indeed, at the date of this writing, the position formerly held by Petitioner has been abolished for almost five years. Petitioner's failure to act and his inconsistent conduct to the prejudice of Respondents bar this action as a matter of law.

Further, Petitioner's position as head of his department, by statutory definition, exempts him from the Ohio classified civil service. In accordance with Ohio law, Petitioner was an unclassified public employee serving at the discretion of the appointing authority. Since existing state law does not support a legitimate claim of entitlement to continued employment, no constitutionally protected property right can exist.

Respondents respectfully submit that the decisions of the District Court and Sixth Circuit Court were correct and Petitioner's request for a hearing on the merits should be denied.

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CLERK

CASE NO. 83-705

UNITED STATES SUPREME COURT

October Term, 1983

WERNER DIRON,
Petitioner
V
CITY OF EASTLAKE
and
MORRIS BECKER, Individually and
as Mayor of the City of Eastlake,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO RESPONDENTS' QUESTIONS PRESENTED AND STATEMENT OF THE CASE

The "admitted position as head" has been taken out of context in order to enhance the argument of Respondents that laches is a substitute for a state statute of limitations in order to circumvent the Congressional intent to allow redress in the courts under Section 1983. Diron's affadavit (see Appendix) filed with his Brief in Opposition to Joint Motion of Defendants for Summary Judgment, clearly raised questions about whether he was a classified or an unclassified employee. Coupled with the commendation letter of October 6, 1978 which he received from his superior, the Director of Public Services, Diron clearly was not the Superintendent of the Eastlake Sanitation Department.

Respondents did not follow their own procedures for discharge as mandated by Eastlake's own Charter which had adopted Ohio law concerning discharge procedures. They admit that the Eastlake City Council did not formally abolish the position of Superintendent until more than 5 months after the August 3rd, 1978 memo which Mayor Becker prepared and ordered Diron to sign (p.3 of Respondents' Brief). The lame excuse that this was done "as a cost saving measure" is irrelevant and misleading. Becker simply wanted to get rid of Diron. When put in its proper context, it is readily apparent that the position Diron held was a garbage man and truck driver. It is true that he was well respected for his diligence and dedication to being a good garbage man. When there was work to do, he did it. He was looked up to as a result. He was paid accordingly.

RESPONSE TO RESPONDENTS' ARGUMENTS

I.A. There was no point in pursuing an administrative remedy; what use would it have been to have been reinstated to a job in which he was back working again for the Mayor who had fired him? And the time within which to seek a judicial remedy under any applicable Ohio Statute of limitations was at least four years and more probably ten — it is that statute of limitations that Respondents seek to deny Petitioner under an equitable

doctrine, when Respondents themselves have not done equity.

I.B. The reasoning in the *Sheets* case was for a mandamus action. It was bad law in 1944, and age has given that type of thinking no reason for being perpetuated. Of course Sheets could have refrained from applying for a pension. When you are fired and no longer employable, of course you are going to seek income from your pension if you have one. *State, ex rel. Sheets v Portsmouth*, 143 Oh St 302.

Diron was not the Superintendent — although Becker's document stated he was. Diron's own boss said he was a working foreman — hardly an unclassified job. He didn't voluntarily retire — there was coercion and attempted cover-up. And the job wasn't abolished until months after Diron was wrongfully and in bad faith fired.

I.C. Since *Arant*-type thinking in 1918 considered "manifest inequity," is it not time to accept as "manifest inequity" what a comparison of the Mayor's August 3, 1978 memo with the Service Director's October 6, 1978 commendation clearly shows? If there had been no bad faith discharge of Diron by the all-powerful governmental authority, this question of equity under Section 1983 would not even be being raised here.

II.A. Diron was a garbage man, and therefore a classified employee. His affidavit (see Appendix) left no question of that. The attempt by Becker to promote Diron to "Superintendent" so as to legally fire him can easily be seen through. Respondents have sought to promote him into an unclassified status in order to evade answering for their wrongful discharge of him.

The "royal gift" as cited in *Knoup* bestowed upon Diron was the right to collect garbage. *Knoup, Treasurer v Piqua Branch of State Bank of Ohio*, 1 Oh St 603 (1853). And the Mayor took it away.

The highest court in Ohio to rule on the question has held that public employement is a property right for which a damage suit may be brought under 42 USC 1983. *Jackson v. Kurtz* [*citing Board of Regents v Roth*, 408 US 564 (1972)], 69 Oh Ap 2d 152(1979).

The transparent attempt to elevate Diron to "Superintendent" is simply an excuse by the Mayor of the City of Eastlake to avoid and evade compliance with the

procedural rights to which Diron was entitled under Eastlake's own Charter: written charges; reasons; the filing of an order; an opportunity to be heard (Ohio Revised Code Section 124.34). How can Respondents ask that the equitable doctrine of laches be invoked, when they themselves did not do equity! All this is merely an effort to have an equitable doctrine time bar a clear statutory right to relief under an Ohio statute of limitations that governs where no Congressional time limit has been clearly stated.

Earlier this year, the 3rd Circuit was faced with the question whether to apply a 6-month or a 6-year statute of limitations to an action involving Section 1983. In deciding that the longer limitations period applied, the Court followed the reasoning that because Congress has not prescribed a specific statute of limitations for actions brought under Section 1983, it is necessary to borrow the state law of limitations governing an analogous cause of action; it then analogized that claim under the federal Civil Rights Acts to those torts which involved the wrongful interference with another's economic rights or interests. It stated that the borrowed state statute reflects Congress' view that the borrowed statute serves only as the source of the federal law which appropriately governs federal civil rights actions. When poured into the federal vessel, the Court went on, the state statute becomes a federal legal precept, and all aspects of the proceeding must be measured by the federal interest implicated in the case. The void created by Congress' failure to establish a statute of limitations for Section 1983 actions, the Court determined, cannot be filled with a state limitations provision which is inconsistent with the federal interest sought to be vindicated. The Court stated that to apply the shorter limitations time would "contravene the remedial purpose of federal civil rights actions and deny appellant the breadth of Section 1983's sweep," and would tend to severally limit access to the courts for the purpose of vindicating individual rights. *Knoll v Springfield Township School District*, 699 F 2d 137 (3rd Cir. 1983). This Court should make clear that a Section 1983 action brought well within the Ohio statute of limitations cannot be time barred through erroneous application of an equitable doctrine, particularly where no equity has

been done by the political agency seeking to exercise its whim.

II.B. Diron was not on the witness stand—neither his demeanor nor the context of his statement excerpted by Respondents was observed by any trier of fact. His affidavit was a proper way to oppose the Summary Judgment Motions. By itself it raised a question that was not answered as a matter of law as to whether he was or was not a classified employee.

CONCLUSION

Ohio's governing statute of limitations clearly gives Diron ten years within which to file. The intent of Congress under Section 1983 is to grant relief, not stifle it. It is not true that the position formerly held by Diron has been abolished for almost five years — he never was Superintendent. It is time to consider the rights of the victim of this bad faith discharge by the elected agency acting under color of the authority of City of Eastlake.

Diron had a property interest, a claim of entitlement, in his job as garbage man, and the Mayor deprived him of it without due process.

That Diron could have proceeded under Ohio administrative law has no bearing upon his right to be heard in a Section 1983 action. He could have proceeded under both. He was not required to elect which remedy to pursue. The remedies are not mutually exclusive. Yet the trial court and the 6th Circuit have now held that they are. That in itself flies in the face of the Congressional intent of Section 1983, and requires intervention by this Court to correct that error.

Neither the District Court nor the 6th Circuit was authorized, in deciding a Summary Judgment, to decide disputed issues of fact. Yet both did. They did so even though each Court had before it Diron's affidavit, and the memoranda of August 1, 1978 and August 3rd, 1978, as well as the October 6th, 1978 letter of commendation from Eastlake's Director of Public Services, who described his former employee as a "working foreman," not a "Superintendant." Each Court also had before it Eastlake's procedure for terminating working foremen (classified

employees), which its Mayor didn't follow.

Cases involving black lung disease, inhalation of asbestos, and wrongful internment of Japanese-Americans during World War II, all of which occurred decades ago, are now being listened to in our courts. Diron's suit was filed within two years of his wrongful discharge, well within Ohio's ten-year statute of limitations. Shouldn't those public employees who have been subjected to oppression by the whims of elected politicians have the right to be heard under 42 USC Section 1983?

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APPENDIX

STATE OF OHIO :
: SS AFFIDAVIT
COUNTY OF LAKE :

WERNER DIRON, being first duly sworn according to law, deposes and says that he is the plaintiff in this case, and that he had been hired in 1966 by then Mayor Robert Brown to work in the City of Eastlake Sanitation Department; he worked for over twelve years, ending as a foreman on September 22, 1978, his sixty-fifth birthday. His duties at the time of his termination included driving the garbage truck and collecting garbage and rubbish in and about the City of Eastlake. Up through September 22, 1978, he was physically able to perform his duties, and

still is. On or about August 1, 1978, shortly after he returned from his scheduled vacation, plaintiff was told by defendant Morris Becker that plaintiff should either retire or that he would be laid off. No warning had been given to him, nor was any reason given to plaintiff. Faced with having to make an immediate decision about his whole future at the age of 64, and believing under these circumstances that his chances for future income were greater if he were laid off, plaintiff dictated and signed an Inter Office Memo shortly after his first meeting with defendant Becker, stating he would prefer to be laid off. The following day plaintiff was called by David Miller, Eastlake's Finance Director, and told that plaintiff could come back to work on condition that plaintiff give Mayor Becker assurance that plaintiff would retire on plaintiff's sixty-fifth birthday, September 22, 1978. Plaintiff reported for work the next day, but before being permitted to work, he was required to see defendant Becker. At a very short meeting, plaintiff was told by defendant Becker, "You quit or be fired!" Immediately thereafter defendant Becker handed plaintiff a pen and ordered him to sign a document which stated that plaintiff wished to voluntarily resign from the City of Eastlake because plaintiff's position as Superintendent of Sanitation had been abolished. Under those circumstances, plaintiff signed. Plaintiff was not Superintendent of Sanitation. The position of Superintendent of Sanitation had not been abolished as of either August 1, 1978, August 3, 1978, or September 22, 1978. Plaintiff's position as foreman had not been abolished at the time that document was presented by defendant Becker to plaintiff to sign, or at any other time. Plaintiff was led to understand that if he were laid off, as opposed to resigning, he would receive none of his accumulated sick leave. Plaintiff was paid only a portion of the sick leave that he had accumulated. Plaintiff did not want to leave the employ of Eastlake. No complaints, charges or accusations were made against plaintiff as a reason for requiring plaintiff to leave his employment, either written or oral. Defendants did not hold any hearing at which plaintiff was allowed to defend himself. After plaintiff's meeting with defendant Becker on or about August 3, 1978, plaintiff was permitted to work until his sixty-fifth birthday, September 22, 1978. Mayor Becker did not hire

or appoint plaintiff, nor did he promote plaintiff; in fact, Mayor Becker fired plaintiff.

Affiant further says that he did not make policy decisions, nor was he consulted on policy decisions. Mayor Becker never consulted with affiant in policy matters.

Since he was given no choice by Mayor Becker except to quit or be fired, and believing that no one else would hire him at his age and with his job background, affiant felt he had to make some decisions quickly in order to provide the most income he could for himself and his wife.

Affiant further states that he never wanted to retire, and that he did so only because he was forced to. He wanted to keep working at his job for the City of Eastlake, and believes he still would be doing that job if he had not been forced to retire.

/s/ Werner Diron
Werner Diron

SWORN TO BEFORE ME and subscribed in my presence this *16* day of March 1982.

/s/ Albert B. Polen
Albert B. Polen, Notary Public
for the State of Ohio
My commission has no
expiration date
R.C. 147.03

CERTIFICATE OF SERVICE

Three copies each of the foregoing Reply Brief were sent to Theodore R. Klammer, Attorney for City of Eastlake, Respondent, c/o Mastrangelo, Freda & Klammer, Parkhill Professional Building, 35100 Euclid Avenue, Willoughby, Ohio 44094 and to C. Reynolds Keller, Jr., Attorney for Morris Becker, Respondent, c/o Weston, Hurd, Fallon, Paisley & Howley, 2500 Terminal Tower, Cleveland, Ohio 44113 by regular U.S. mail, postage prepaid, this _____ day of December, 1983.

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